

29 March 2018

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# Last chance for an exit from Brexit?

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***"Brexit means Brexit, and we're going to make a success of it."***<sup>1</sup>

Theresa May, Speech in Birmingham, 11 July 2016

***"The only real alternative to a 'hard Brexit' is 'no Brexit'."***<sup>2</sup>

Donald Tusk, Speech at the Annual Conference of the European Policy Centre, 13 October 2016

***"The British people should be given a final say on whatever deal is negotiated. If they are allowed that say, then Brexit can be averted."***<sup>3</sup>

Tony Blair, Speech to the European Policy Centre, 1 March 2018

***"Rather than rescuing the European Union by keeping it intact, an exit from Brexit could splinter the Union from within."***<sup>4</sup>

Fabian Zuleeg, Exit from Brexit? Not likely but uncertainty prevails, EPC Commentary, 12 July 2016

## BACKGROUND – TO BREXIT, OR NOT?

### The will of the people?

The result of the Brexit referendum on 23 June 2016 came as a shock to many, including much of the political establishment in the United Kingdom (UK). With a relatively narrow margin of victory (less than 4%) and Scotland, Northern Ireland, and London clearly voting to Remain, the vote left the country deeply divided. The immediate decision of Prime Minister David Cameron to resign, triggering a leadership contest in the Conservative Party, added to the overall sense of dislocation. In addition, there was a degree of uncertainty about the final outcome. In the UK, a referendum is non-binding and the final decision-making body remains the House of Commons. Since there appeared to be a solid Remain majority in Westminster then, there was speculation that the result of the referendum might not be followed, and that Brexit could be averted.

From an EU perspective, a UK reversal of the decision would surely have been welcomed in the summer of 2016. But domestic politics in the UK was on a different trajectory. Abiding by the result of the referendum was portrayed as the only democratic choice within both major parties, Conservative and Labour. Many (Conservative) parliamentarians who had previously campaigned to remain committed to heeding the result of the referendum, including Theresa May who was elected by the Conservatives to succeed David Cameron. In the leadership election campaign, her slogan was 'Brexit means Brexit', making it clear that under her stewardship the UK would leave the European Union (EU).

### Brexit means Brexit

In the following months, positions hardened on both sides. The prime minister committed repeatedly to not only leaving the EU, ruling out a second referendum, but also to exiting the Single Market and the Customs Union. While legal cases established that the House of Commons had to be involved in crucial stages of the exit process, when it came to decision time on whether to trigger Article 50, the vast majority voted with the government. Consequently, the Article 50 letter, notifying the European Council of the UK's intention to leave the European Union, was submitted on 29 March 2017, starting the two-year countdown with the foreseen endpoint marking the moment when the UK will be outside the EU.

Even though there was no desire to punish the UK, attitudes were also changing in the EU27. While most called for a close economic and political relationship post-Brexit, there was also a rapid recognition, and remarkable unanimity, that a special partnership or a form of associate membership could not be allowed to undermine the legal framework of the European Union or the coherence of the EU's Single Market or trade policy. This led European Council President Donald Tusk to conclude that *"The brutal truth is that Brexit will be a loss for all of us. There will be no cakes on the table. For anyone. There will be only salt and vinegar. If you ask me if there is any alternative to this bad scenario, I would like to tell you that yes, there is. In my opinion, the only real alternative to a 'hard Brexit' is 'no Brexit'."*<sup>5</sup> But while European leaders never ruled out an exit from Brexit, they were very conscious that it was highly unlikely.

## Hope springs eternal

The path to Brexit thus seemed to be clearly set. But given the determination of the EU27 to not allow cherry picking, and the political red lines of the UK – namely leaving the Single Market, the Customs Union and the jurisdiction of the European Court of Justice (ECJ) – many in the UK have started to question the necessity for such a hard Brexit with economically disastrous impacts. For some, there could only be a majority in the House of Commons for a soft Brexit. When the courts affirmed Parliament's right to hold a meaningful vote at the end of the negotiation process, many saw the road opening to a softer Brexit, overriding the red lines of the Brexiteers.

Theresa May's attempt to settle the question and assert her authority backfired spectacularly when the early general election she called on 8 June 2017 led to a minority government, reliant on a deal with the Democratic Unionist Party. Rather than delivering a 'strong and stable' government, able to negotiate in a confident and unified way with the EU27, divisions within government and the Conservative Party have been there for all to see, with the UK now playing a weak card in the negotiations with one hand tied behind its back.

More recently, a slow shift in public opinion and the increasing recognition that a hard Brexit jeopardises the open border in Northern Ireland have emboldened once again those that see a chance that Brexit might not happen in the end. The proponents of a second referendum, with a view of a reversal of the decision, are increasing and now include, for example, former Prime Ministers John Major and Tony Blair. Many in the opposition parties are advocating such a move, joined by some Tory rebels. So far, however, it is not the official position of the Labour Party: its leader Jeremy Corbyn has clearly stated that "We are leaving the European Union"<sup>6</sup>. Nevertheless, there is now a certain momentum toward an exit from Brexit – but how realistic is this?

## STATE OF PLAY – REVERSING FROM THE CLIFF EDGE?

### Where there's a will, there's a way?

Practically, the hurdles that would need to be overcome to stop the process are formidable, not least in terms of timing. Tony Blair in his appeal for an exit from Brexit noted that there are only "months, perhaps weeks to think, plan and act."<sup>7</sup> Unless the process is stopped or extended, the UK will be outside the EU in March 2019; at which point the exit from Brexit option disappears. But, in reality, timing is even more tight. A UK decision to withdraw the Article 50 notification would have to happen well before that date to allow time to include the UK in the European Parliament elections in May 2019, a legal necessity, given that the UK would remain a member state in this scenario.

This also makes any extension of the Article 50 period a tricky proposition. While the Article 50 process is under way, the UK remains a member state with all the rights and obligations. If the EU decides to extend the Article 50 period, the UK would have to take part in the EP elections and, depending on the length of the extension, the appointment of the next EU Commission and the next Multiannual Financial Framework. In any case, an extension would require the unanimous support of the EU27, making it highly unlikely. Even in normal times, unanimity is a high hurdle. Here, specific issues are bound to be raised by individual member states intent on using the leverage of a hard deadline to, for example, hold the UK to its commitments regarding the Northern Ireland border.

The alternative to an extension is to stop the Article 50 process altogether. But it remains unclear whether the UK can simply withdraw the notification unilaterally or whether it needs the consent of the EU27 and the EP. Legal opinion is divided so a court case in front of the ECJ would be needed to settle the question, which takes even more time. In case the UK requires consent, any agreement is likely to include significant and unpalatable conditions around the UK's budgetary contributions and its opt-outs, as well as its commitment to European integration.<sup>8</sup> But even a unilateral withdrawal of the Article 50 letter could carry a cost. In the next MFF negotiations, for instance, there would be little appetite to allow the UK to retain its rebate. For the UK, there would be no possibility to legally tie a remain decision to any reforms on the EU side in areas such as free movement of citizens. A revocation of Article 50 would result in a mere falling back to the *status quo*. Politically, some have argued that the EU27 should carry out such reforms anyway to make a re-entry more tempting for the UK. But, there is no political will among the EU27 to

further accommodate the UK, and, most likely, not enough time left to negotiate such reforms. The only recourse for the UK would be to use existing provisions under EU law to impose some constraints on freedom of movement to try to persuade British voters that some more 'control' is being exerted.

### **The duty of sincere cooperation**

A UK decision to revoke Article 50 would inevitably carry some ambiguity in the eyes of the EU27: while preventing Brexit would mostly be seen positively, there would also be a concern that the UK would be an even more awkward partner in future, with the domestic debate unresolved. In the end, the EU27 reaction to an Article 50 withdrawal would hinge on whether the UK is seen as making a real and genuine commitment to the EU, or simply using a tactical ploy to buy more time. Politically, the EU27 would certainly reject any outright attempt to play for time. Even in case the UK could normally withdraw the notification unilaterally, a tactical withdrawal of the notification could be rejected by the ECJ as breaching the UK's legal duty of sincere cooperation, namely "to assist each other in carrying out the tasks which flow from the Treaties."

But the situation might not be that clear cut. After all, uncertainty is one of the defining characteristics of Brexit. What if the UK government falls and a new Prime Minister wants to go to the people again in a second referendum? What if a new government pleads for time to sort out what has been left by the previous one, without knowing whether the final outcome would be an exit from Brexit, EEA membership, a trade deal or something else altogether? And what if Westminster rejects the final negotiated deal but has nothing else in place? At the very least, this would create further uncertainty and political tensions in the EU27 of how best to handle such a situation.

## **PROSPECTS – TOO LITTLE, TOO LATE**

### **Locked in**

Regardless of the legal situation and how the EU might react to any attempt to reconsider the Brexit decision, the biggest hurdles lie in UK domestic politics. It can be argued that EU reforms would help that process along but, aside from the likelihood of that happening at this stage, the British people's reaction to David Cameron's 're-negotiation' in the run-up to the referendum shows how limited the EU's influence is likely to be.

Within the UK domestic debate, only a minority of voices talk of an exit from Brexit, even on the pro-EU side. There remains a great fear of being branded a traitor to democracy if advocating a reversal of the referendum vote. Consequently, most Remainers are supporting the softest of Brexits as an alternative to the hard Brexit vision of the UK government rather than an exit from Brexit. With few exceptions, it has become the most common alternative scenario propagated by those in Labour, and among those Conservatives who disagree with Prime Minister May's vision. Even among those who could potentially end up in the exit from Brexit camp – as a result of public opinion decisively swinging in that direction – there remains a marked tendency to reject certain obligations and rules of membership. Staying on as member of the EU without addressing any of the issues raised in the referendum campaign seems a step too far, even for the remaining Remainers.

Any swing to remain would therefore have to be ascertained in a general election and/or a second referendum. Even if there was sustained, broad and effective campaigning across the political spectrum to stay in the EU, there is no guarantee that a vote would be won, let alone with a large and convincing margin. Many people who would tend towards remain would vote on a range of issues, not solely on EU membership, and a significant part of the electorate is likely to vote determinedly and angrily to strengthen extreme positions on Brexit to punish those who would be seen by them as betraying not just Brexit but democracy itself.

### **In the long run...**

Even if all the legal, political and practical hurdles were to be overcome, there would be no guarantee on the longevity of the UK commitment to EU membership. After all, no real legal/constitutional safeguards exist that can strongly bind future parliaments. So, in future, one cannot rule out another political backlash, which could lead to an even more chaotic Brexit scenario implemented hastily by a staunchly anti-EU government.<sup>9</sup> Even if the UK remained in the EU in the long run, the UK would most likely be permanently marginalised.

For the EU27, the UK remaining is far from unambiguously positive. While it would prevent the immediate economic costs and, arguably, would show the EU27 and the rest of the world that leaving the Union makes no sense, in practical terms, it might make it even more difficult to find consensus in the EU. In addition, the possibility of the UK restarting the process would always be in the back of leaders' minds. But despite misgivings, if the UK genuinely rescinds its Brexit decision, the EU27 would have little choice but to welcome it, ignoring the negative impact the Brexit process has already had.

## Schrödinger's Brexit

In the end, an exit from Brexit remains unlikely due to the domestic reasons outlined above. But there is another scenario that would be difficult for the EU27 to deal with. The real crunch point for the UK government will come when the House of Commons decides on the Withdrawal Agreement. If that deal is rejected, the UK is in a desperate situation. Without an alternative deal on the table and with no time remaining to negotiate anything else, Westminster would in reality not have a choice at all: even the worst of deals is better than no deal at all.

With an extension in the Article 50 negotiations highly unlikely, in that situation, there might well be a temptation to (unilaterally) withdraw the Article 50 letter to buy time rather than genuinely wanting to remain. Arguably, there could be the possibility of re-submitting the notification, for example, after a general election that would confirm the UK's exit from the EU. It is far from clear what the EU27 response would be under this scenario and whether unity could be maintained, especially if such a vote were accompanied by significant political change in the UK, such as a change in government with a different political commitment to Brexit. It is high time that the EU decides how to react to such a scenario, which might only be months away. At the very least, it should be made clear that the EU27 can only react to a reversal in direction if it is backed up by a concrete and unambiguous decision in the UK, and that any attempt to play for time will be rejected.

## All that remains

In the end, despite the uncertainty and despite the negative implications of Brexit, the UK will in all likelihood leave the EU in March 2019. There is only a very slim chance of reversal in the time left before the UK automatically exits. But despite the remote possibility, the EU27 should not close the door to this scenario.

At the same time, the EU needs to continue to stick to its guns and "apply a large degree of Realpolitik, defending the EU's 'national interest' and holding the red lines of the four freedoms and exclusion from decision-making."<sup>10</sup> The first priority is to get a withdrawal agreement in place that would offer a satisfying solution for the Northern Ireland border and define an (extendable) transition period. During the transition time, there is a need to negotiate a trade deal while keeping the door open for higher levels of integration (EEA) short of membership if this becomes politically feasible in the UK, while also including contingency planning for no deal, which remains a distinct and high possibility also in the next stage of negotiations.

What happens in the very long run after the UK exits the European Union is hard to predict and will depend not only on the divorce proceedings but also on how the EU-UK relationship develops over time. As Jean-Claude Juncker puts it: "Once the British have left under Article 50 there is still Article 49 which allows a return to membership and I would like that."<sup>11</sup> So even though an exit from Brexit is unlikely, maybe a re-entry in future remains a possibility – but not for a long time yet.

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*This Policy Brief builds on the discussions of the EPC's Brexit Forum which is kindly supported by the Friedrich Ebert Stiftung, Amazon and IKEA.*

*The views expressed in this Policy Brief are the sole responsibility of the author.*

- <sup>1</sup> Theresa May, Speech in Birmingham, 11 July 2016, <http://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html>
- <sup>2</sup> Donald Tusk, Speech at the Annual Conference of the European Policy Centre, 13 October 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/10/13/tusk-speech-epc/>
- <sup>3</sup> Tony Blair, Speech to the European Policy Centre, 1 March 2018, <https://institute.global/news/tony-blairs-speech-european-policy-centre>
- <sup>4</sup> Fabian Zuleeg, "Exit from Brexit? Not likely but uncertainty prevails", EPC Commentary, 12 July 2016.
- <sup>5</sup> Donald Tusk, Speech at the Annual Conference of the European Policy Centre, 13 October 2016.
- <sup>6</sup> Jeremy Corbyn, Speech on Britain after Brexit, 26 February 2018, <https://labour.org.uk/press/jeremy-corbyn-full-speech-britain-brexit/>
- <sup>7</sup> Tony Blair, Speech to the European Policy Centre, 1 March 2018
- <sup>8</sup> Andrew Duff, "Brexit: What if Britain changes its mind?", EPC Discussion Paper, 18 January 2018.
- <sup>9</sup> Fabian Zuleeg, "Exit from Brexit? Not likely but uncertainty prevails", EPC Commentary, 12 July 2016.
- <sup>10</sup> *Ibid.*
- <sup>11</sup> Jean-Claude Juncker, 17 January 2018, <http://www.independent.co.uk/news/uk/politics/jean-claude-juncker-uk-eu-brexit-rejoin-referendum-president-article-49-a8163671.html>

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